# SUPREME COURT OF THE UNITED STATES

October Term, 1945.

No. 1124

R. E. SCHEFFLER, doing business as Schreffler Steel & Supply Co.; and BYRON G. ROGERS, Guardian ad Litem, Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT.

W. Davis McClain,
Frank A. [illegible],
Of Counsel,
Mid[illegible],
[illegible].

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

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No.....

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R. E. SCHREFFLER, doing business as Schreffler Steel & Supply Co.; and BYRON G. ROGERS, Guardian ad Litem, PETITIONERS,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, RESPONDENT.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on the 12th day of January, A. D. 1946. (R. page 66).

### OPINION BELOW.

The Opinion of the Circuit Court of Appeals for the Tenth Circuit will be found at pages 61 to 66 inclusive, of the Record. The opinion is not as yet reported.

## JURISDICTION.

The judgment of the Circuit Court of Appeals for the Tenth Circuit which is the subject of this review was entered on the 12th day of January, A. D. 1946. (R. pages 61-66). The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U.S.C.A. par. 347 (a) ).

## QUESTIONS PRESENTED.

The questions presented for determination are:

(1) Whether the written and oral contracts specially pleaded in the Eighth Defense were unlawful per se and thus failed to raise a material issue of fact so as to preclude the operation of Rule 56 of the Federal Rules of Civil Procedure.

(2) Whether the bar of the Statute of Limitations provided for by Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended June 30, 1944, which was specially pleaded and raised in the petitioners' Fourth Defense of their answer to the amended complaint, raised a genuine issue of fact or law so as to preclude the operation of Rule 56 of the Federal Rules of Civil Procedure.

(3) Whether the affidavits attached to respondent's motion for summary judgment were entitled to any probative value so as to form the evidentiary basis of the judgment rendered against the petitioners.

## THE STATUTES, REGULATION AND RULES OF CIVIL PROCEDURE INVOLVED.

The pertinent Sections of the Emergency Price Control Act of 1942 as Amended and Extended,[1] Revised Price Schedule No. 49, and the Rules of Civil Procedure are set out at pages I to IV of the appendix.

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[1] 50 U.S.C.A. App. 313.

## THE STATEMENT.

The respondent, pursuant to the authority vested in him by Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended, filed his amended complaint alleging violations of Revised Price Schedule No. 49 in the sale of iron and steel products to several and divers customers, and attached to the complaint Exhibit "A", which enumerated the alleged violations (R. 15-19) and prayed judgment in the sum of $197,638.35. (R. 8-10).

The competency of R. E. Schreffler was questioned and the trial Court appointed Byron G. Rogers, Guardian ad Litem. (R. 23).

The answer pleaded a general denial and set forth eight separate defenses and demanded a jury trial.

The Fourth Defense pleaded the Statute of Limitations (R. 27) and Exhibit "3" attached to the answer, set forth the sales barred by the Statute of Limitations (R. 35-38). The Eighth Defense alleges a contract of employment which is attached to the answer as Exhibit "4". (R. 38-41).

A motion for summary judgment was filed alleging that the Fourth and Eighth Defenses are false, fictitious and sham and raise no genuine issue of fact. (R. 45-46). Presented with the motion for summary judgment were the affidavits of employees of the respondent which state that the said employees had made a correct and true itemization of all iron and steel products sold. Such itemization was the result of their examining invoices, customers' purchase orders, freight bills, correspondence, and all other records, papers and accounts relating to this litigation, together with the records of the carriers which transported the material, and alleged that the amount of overcharges was $65,879.49, and that in the opinion of the affiants the denials contained in petitioners' answers have not been made in good faith and are sham, and that the petitioners have no good, valid or substantial defense on the merits and were interposed for the sole purpose of delay. Thereupon summary judgment was granted by the trial Court.

A. THE WRITTEN AND ORAL CONTRACTS WHICH THE PETITIONERS SPECIALLY PLEADED AND RAISED IN THEIR EIGHTH DEFENSE OF THE ANSWER TO THE AMENDED COMPLAINT DID RAISE A MATERIAL ISSUE OF FACT SO AS TO PRECLUDE THE OPERATION OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN FAVOR OF THE RESPONDENT.

In their Eighth Defense to the amended complaint the petitioners alleged as follows: (R. 31)

> "That for the period beginning April 17, 1943 and ending February 17, 1944, the time alleged in paragraph 5 of the amended complaint as the interim in which the alleged violations complained of were committed, and prior thereto, the said R. E. Schreffler was not engaged in the business of buying, selling, and reselling iron and steel products and therefore was not amenable to Revised Maximum Price Regulation No. 49, but on the contrary was in the hire and employ of Aircraft Mechanics, Inc. of Colorado Springs, Colorado, as a material expediter pursuant to a written contract, a copy of which is hereto attached and made a part hereof and marked Exhibit '4', and was, during all times complained of in paragraph 5 of the amended complaint, in the hire and employ of the Douglas Aircraft Company, Inc., Los Angeles, California, in a similar capacity, pursuant to an oral contract, the terms and conditions of which were substantially the same as those recited in Exhibit '4' hereinabove referred to."

The Court below in its opinion dismisses this defense as raising no genuine issue of fact with the statement that the contracts referred to contained "many of the elements of a contract of sale and purchase". The petitioners urge that a careful consideration of the provisions and conditions of the contracts will disclose a lawful covenant of employment of a competent and highly regarded engineer by reputable corporations under obligations to their government to expedite production of aircraft under their war contracts.

The preamble to this instrument after very carefully reciting the motives which impelled its execution concluded as follows:

> "We agree to and do hereby appoint you as our agent for the engineering, scheduling and procurement of steel and other metal materials for a period of one year from January 1, 1943."

The language of this paragraph is the usual and customary phraseology used in the appointment of an agent by a principal and calls for the professional skill of an engineer. The "procurement" of the metal materials is only one phase of the obligation it imposes on the petitioner R. E. Schreffler. It requires, in addition thereto, the "engineering" of the steel as well as its "scheduling". The engineering of steel is the art of designing, modeling and patterning of the metal. Its scheduling, as that term is understood in the industry, includes its orderly laying out, its analyzation for component parts and its scientific treatment. It is common knowledge that the seller of steel does not afford to the buyer these highly technical and professional services required of the petitioner by the terminology of this portion of the contract. It does not require the sale of the commodity but only its procurement by the petitioner in a fiduciary capacity.

Paragraph (a) of the agreement provides,

> "You agree:
>
> > "To buy at most favorable market at best price consistent with quantity and quality, and obtain all discounts * * * or allowances prevalent in the trade to which either you or we may be entitled."

This provision authorizes the purchase by the petitioner at best prices. It is part of his obligation to procure. In buying he is required to obtain all discounts that either he or his principal is entitled to. If this were a contract of sale rather than a contract of employment, the Company would not be entitled to the intermediate discount that the petitioner would receive as a buyer from his supplier. They claim it now under the terms of this agreement only because

such intermediate discounts would come to the petitioner not as a purchaser from the supplier, but as the fiduciary for the company. It will be noted that the phraseology contained in this paragraph limits his efforts to the purchase of materials.

Paragraph (b) of the covenant provides,

"You agree:

"To schedule all steel to be purchased by us and furnish all engineering services in connection with the quantity and quality of our steel requirements."

This paragraph not only requires the the petitioner R. E. Schreffler, to schedule and engineer the steel and metal materials which he procured, but all the steel purchased by the principal from whatever source it came. It is respectfully submitted that a seller is not very often concerned with the engineering and scheduling of steel which comes from competitors.

Paragraph (c) provides,

"To act as liaison officer with the mill for the arrangement of melts and to do all other things necessary or proper for the expediting of all delivery schedules and promotion of the quickest deliveries possible, consistent with our production schedules."

This paragraph in very definite language requires the services of the petitioner as a material expediter and liaison officer. These services were required of him for the purpose of keeping production moving. It does not limit these activities to the steel and metals that he procured but required him to apply himself as well to "the expediting of all delivery schedules." The Company had many sources from which it procured steel. The petitioner was obligated to keep moving and expediting materials so that production at the plant would flow evenly in accordance with the Company's production contracts.

Paragraph (d) provides,

"You agree:

"To furnish all engineering and expediting of steel or metal procurement services conformable to the production schedules of the Company; and in that connection to schedule, chart and set up and maintain records of all contracts and production schedules of our Company; and to furnish expert engineering and procurement advice in connection therewith."

The language of this paragraph should dispel any doubt of the relationship which existed between the petitioner R. E. Schreffler, and the Company for not only does it require him to furnish all engineering on all of the Company's production schedules and contracts, but also requires him to schedule, chart, set up and maintain records of "*all contracts and production schedules of our (the) Company.*" The scheduling, the charting and the expert engineering advice required was for all of the Company's contracts and production schedules. That is to say, he was not only required to schedule, chart, set up and maintain records of all procurements and contracts, but also schedules of the finished product of the Company. This is not a service which a seller supplies to a buyer as an incident to the purchase. The great demand for steel during the war emergency did not lend itself to the need for the supplying of incidental services by a seller to this purchaser in order to effect a contract of purchase and sale.

Paragraph (e) of the covenant required the petitioner R. E. Schreffler to make physical and chemical analysis of all steel purchases made by the Company for the purpose of assuring it that they met the requirements of prime contracts and government specifications and regulations. With all the necessary government regulations of the industry the doctrine of caveat empter was never abandoned. Accordingly, if the petitioner was a seller instead of an employee, he was under no obligation to see that all steel and metal purchases by the Company should meet the requirements of prime contractors and government specifications.

Paragraph (f) authorized the petitioner, in the dis-

charge of his obligations to procure steel, "*to make all purchases either in the name of this Company or in the name of yourself as agent for this Company.*"

This paragraph very definitely intended that the title to all materials purchased by the petitioner should pass from the supplier to the Company in the first instance. The petitioner not having title could not pass it to the Company, and consequently there was no sale.

Paragraph (g) merely prescribes the procedure which the petitioner was to follow in billing the Company for all the purchases made by him and for which he had advanced the money in accordance with the directions contained in paragraph (f).

Paragraph (h) of the agreement provides,

> "To carefully study all purchase orders and purchase contracts and purchase proposals entered into by us or submitted to us for performance; to break same down from an engineering standpoint as to steel or other metal requirements; to furnish engineering advice and reports in writing as to the quantity and quality of the various steel and metal materials entering into the performance of same and the estimated cost thereof, together with estimates of the quickest delivery date thereon."

By the terms of this paragraph the petitioner was to supply the services usually required of an estimator. After carefully studying all purchase orders and purchase proposals of the Company he was to give advice as to the cost, the quantity and quality of metal materials entering into the manufacture of the finished product by the Company, as well as estimates of deliveries thereof. It is respectfully submitted that if the petitioner was the seller of the raw materials which went into the production of the Company's finished product, rather than an employee, he would not be concerned with whether or not the Company could realize profits from contracts which were submitted to it for performance.

Paragraph (i) of the covenant obligates the petitioner to make available to the Company the warehousing facilities which he owned at Denver, Colorado, for the purpose of

storing raw materials and the finished products of the Company. The requirement must be examined in the light of the motives which impelled the execution of the contract. Originally reimbursement to the petitioner was to be handled by the differences in price between cost of materials to him and the price paid for mtaerials by the Company. After checking with the Office of Price Administration to determine whether this method was proper under the Regulations, it was found wanting and Widmer, an official of the Office of Price Administration in charge of steel and iron Regulations, suggesting that the petitioner be *hired* by the Company. This left the petitioner without any need for his warehousing facilities and afforded to the Company facilities near railroad terminals. It was only natural, therefore, that the Company availed itself of them, not as an incident of any sale, but as a facility to speed up production and delivery.

Paragraph (j) permitted the Company to avail themselves of the petitioner's clerical and administrative personnel for the same reasons hereinabove stated.

Paragraph (k) prescribed the method which the petitioner was to use for reimbursement of travel expenses incurred in the discharge of his fiduciary relationship.

It has long been the established law that on a motion for summary judgment, the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party. All doubts are to be resolved against him.[2] The record in the instant case is devoid of any evidence on the principal issue raised by this defense, for neither the affidavits which are offered in support of the motion for summary judgment, nor any other source of information available makes reference to these contracts. In considering the motion, the Court should take the view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all the favorable inferences that may reasonably be drawn from the evidence. If when so viewed reasonable men might reach different conclusions, the motion must be denied and the case tried on its merits.[3]

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[2]Walling v. Fairmont Creamery Co., 139 F. 2d 318.

[3]Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101.

It is respectfully submitted that the analyzation of the above and foregoing Sections of the covenants not only permits most favorable and convincing inferences which should be resolved in favor of the petitioners, but also demonstrates that real and material issues are presented upon which reasonable men could reach different conclusions and therein lies the issue of fact which precludes the operation of Rule 56 of the Federal Rules of Civil Procedure in favor of the respondent, and allows and permits the petitioners the right to be tried by a jury.

In addition to determining that the contracts which were the basis of petitioners' Eighth Defense were covenants of purchase and sale rather than of employment, the learned Court below concluded that they exhibited a clear intent to evade Section 1306.151 of Revised Price Schedule 49 by way of "commission, service or otherwise". The pertinent section of the Price Schedule provides,

> "The price limitations as set forth in Price Schedule No. 49 shall not be evaded either by direct or indirect methods in connection with the purchase, sale, barter, delivery or transfer of iron and steel products alone or in conjunction with any other material or by way of any commission, service, transportation or other charge * * * or by way of tying agreement or other trade understanding, or otherwise." (App. p. III.)

The petitioners concede that the gravamen is the evasion of the price limitation by direct or indirect methods. But the evasion whether direct or indirect, resolves itself into a question of the intention of the parties. A careful analysis of the quoted Section of the Regulation indicates that it is designed to defeat an unlawful conspiracy between the seller and the purchaser. It requires some degree of guilty knowledge and willingness to circumvent the purpose which the Act was designed to accomplish. In the case at bar the expressed intention of the parties is found in the preamble to the contract, which for the purpose of convenience we set out in full:

> "Early in 1942 we solicited your services in the scheduling and procurement of steel and other ma-

terials to be used by us in our production and in our building expansion. Owing to the emergency of our situation, these services were performed by you without definite agreement as to the amount of reimbursement or compensation and without understanding as to how reimbursement or compensation were to be handled. *As you know, it was originally conceived that reimbursement and compensation to you would probably be handled by a difference in price between cost of material to you (which has at all times been fully disclosed to us) and the basic price below the average price theretofore paid by us for like materials... However, it has since been checked and found that the payment of compensation on such a basis would be contrary to the rules and regulations of OPA.* Your services as agent are absolutely necessary to our Company and we do not desire to in any way disturb or discontinue the satisfactory and valuable performance you have furnished thus far. *The remuneration and reimbursement suggested herein is an endeavor to fix the actual value of your services to the Company on a basis of the knowledge and skill you have displayed, the savings we have received thereby and the efforts expended by you in the accomplishment of these services.* Consequently we agree to and hereby do appoint you as our agent for the engineering, scheduling and procurement of steel and other metal materials for a period of one year from January 1, 1943 (unless sooner terminated as hereinafter provided)." (R. 38).

Thus it is apparent that the parties to this covenant did not intend to enter into any unlawful conspiracy to evade the provisions of the Regulation, but on the contrary, to correct a system of reimbursement to the petitioners which was found wanting under the rules and regulations of the Office of Price Administration after its discussion at length with Mr. F. R. Widmer, Head of the respondent's Steel Branch at the National Office in Washington, D. C., on the 23rd day of February, 1943. It was this determination that caused the parties to enter into and execute these agreements. The remuneration fixed therein was not by

way of any commission or service but rather a fixed and determinable wage commensurate with the knowledge and the skill which Schreffler displayed, the savings which his principal received thereby and the efforts expended in the accomplishment of the agency. The record is destitute of any evidence on the part of anyone that it had its beginning in a malicious and wilful intention to circumvent the Act and the pertinent Regulation. The supporting affidavits to the motion for summary judgment make no mention whatsoever of these covenants or that any consideration was given to them. The Court below therefore was without factual support of its alleged illegality. It was without authority to presume its unlawfulness.[4] It is not on its face a contract malum per se. Any type of agreement is a violation of the Emergency Price Control Act if used as a means of evasion of the maximum price regulation, but it must be made to appear that the contract is so used in order to set up a valid charge of the violation of the Act.[5]

In addition to the failure on the part of the respondent to show that the contracts were used to evade the Regulation, the learned Court below failed to take into consideration Section 302(c) of the Emergency Price Control Act by which Section the Congress limited the sphere of operation within which the Office of Price Administration must operate. The term "commodity" as used in the Act is defined as follows:

> "The term 'commodity' means commodities, articles, products and materials * * * and *it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair or negotiation of purchases or sales of a commodity* or in connection with the operations or any service establishment for servicing of a commodity, provided that nothing in this Act shall be construed to authorize the regulation of

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[4]Toebelman v. Missouri Kansas Pipeline Co., 3rd Cir., 135 F. 2d 1016; Miller v. Miller, 74 App. Dec. 216, 122 F. 2d 209; Whitaker v. Coleman, 5th Cir. 115 F. 2d 305; Fishman v. Teter, 7th Cir. 133 F. 2d 222.

[5]Brown v. Banana Distributors of Connecticut, 52 F. Supp. 804.

* * * (5) rates charged for any professional services." (App. p. II.)

The services to be rendered under the contracts and those which the petitioner Schreffler did render pursuant thereto, were in truth and in fact services rendered as an employee in connection with the processing, storage and negotiation of the purchase of steel. The rates charged by him are those specifically exempted as charges for professional services. The remuneration made and provided for in the contract was not "the price" which he demanded or received in connection with the sale of a commodity as that term is defined in Section 302(b) of the Act, but rather a charge for technical and professional skills and services rendered in connection with the engineering, scheduling and procurement of steel and metal materials. The record being devoid of any evidence that the contracts were merely an effort to evade the Act and the Regulation, the Court below was not warranted in holding that it did not present a substantial issue of fact, the determination of which was wholly within the province of a jury.

The contract of employment as set up in the Eighth Defense is valid upon its face. There is nothing in the record to indicate that it is invalid per se and made for the purposes of evading the Regulations. The acts performed by the parties pursuant to the contract can only be interpreted after the receiving of evidence. The trial Court without warrant or authority presumed the contract to be invalid per se without evidence of any kind or character whatsoever. The petitioners herein should be afforded the privilege to support their answer by evidence. The entry of the summary judgment and setting aside a legal contract has denied the petitioners their day in Court.

B. THE LIMITATION PROVISIONS OF SECTION 205(e) OF THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED AND EXTENDED JUNE 30, 1944, SPECIALLY PLEADED AND RAISED IN PETITIONERS' FOURTH DEFENSE TO THEIR ANSWER RAISED A GENUINE ISSUE OF FACT AND LAW SO AS TO PRECLUDE THE APPLICATION OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In the Fourth Defense petitioners set forth in Exhibit "3" items that did not accrue within one year before the commencement of this action. It is petitioners' contention that the dates therein alleged are the dates the violations occurred, if any.

In determining that the petitioners' Fourth Defense wherein the one year Statute of Limitations provided for by Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended June 30, 1944, was specially pleaded, did not raise a material issue of fact so as to preclude the operation of Rule 56 of the Federal Rules of Civil Procedure in favor of the respondent, the Court below reasoned that since Section 4(a) of the Act and the pertinent provisions of the Regulation make it unlawful to "*sell or deliver*" any commodity in violation of a price schedule, an action commenced within one year from the date when the commodity was "shipped and delivered" was timely, notwithstanding the fact that it was admittedly "sold" on a date more than one year prior to the commencement of the action. The language of the Court in this respect is as follows:

> "The words 'sale and delivery' are not synonymous terms. They have separate and distinct meanings. It must be presumed that Congress used them according to their ordinary and usual accepted meaning and understanding. Otherwise there would have been no need to include them both in the Act. Revised Price Schedule No. 49 forbids, among others, the sale, delivery or transfer of iron or steel in excess of the maximum prices. Under both the provisions of the Act and Regulation No. 49 the sale or delivery

> of iron or steel products in excess of the maximum prices constitutes separate and distinct violations. The articles having been shipped and delivered within the one-year period, the action was timely and the statute of limitations was no defense."

It is respectfully submitted that the presumptions which the Court below sees fit to indulge in in order to find a basis for its legal conclusion that the action was timely begun are wholly unwarranted and unnecessary since the Congress gave to the term "sale" definite and conclusive meaning.

Section 302(a) of the Act provides,

> "The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do the foregoing". [App. p. II.]

The term is so broadly defined that it is readily apparent that the Congress intended and did include within its sphere every conceivable physical transfer of personal property as well as contracts or offers to do so. A search of the Act will disclose that the Congress did not attach specific meaning and definition to the term "deliver" but a reading of the quoted definition supra demonstrates that by the use of the phrase *"and other transfers"*, it did make it a part and parcel of the term "sale". But even if for the sake of this argument it was admitted that the terms are not synonymous, there can be no doubt that in an action for damages pursuant to the provisions of Section 205(e) of the Act, the term "sale" includes the term "deliver". The Congress never did intend to give to these phrases "the ordinary and usual accepted meaning and understanding" which the learned Court below in its opinion presumes. But on the contrary, it was never the intendment of the Emergency Price Control Act or the Regulations promulgated thereunder, to have the enforcement of the Act turn upon the technical concepts of the law of sales.[6]

The prohibition of the statute, when a claim for damages is prosecuted by the Administrator pursuant to the

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[6]United States v. Lutz, 3rd Cir. 142 F. 2d 985.

right of action afforded him by Section 205(e) of the Act, as distinguished from an action wherein equitable relief is sought under the provisions of Section 205(a) or a criminal prosecution pursuant to Section 205(c), is against an unlawful "sale" as that term is defined by the Act and not an unlawful "delivery". This must of necessity be the fact, otherwise what damages in the nature of "overcharges" and "penalties" could the Administrator recover or the Court award where there has been an unlawful delivery without a sale? The "overcharges" and the penalties attached thereto are measured only by the amount the seller is unjustly enriched. It therefore follows that the "date of the occurrence of the violation" is not the date when delivery is completed or shipment made, but on the contrary when the seller actually becomes unjustly enriched by reason of his unlawful sale and the overcharge which he receives pursuant thereto, as that phrase is defined by Section 205(e) of the Act. The day of cleavage for the purposes of the limitation provisions made and contained in Section 205(e) of the Act is the day when the actual overcharge occurs. At that moment "*the person who buys such commodity* for use and consumption other than in the course of trade of business may * * * bring an action against the seller *on account of the overcharge.*" In the event that "the buyer either fails to institute action * * * or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States *within such one year period.*" [App. p. I.]

The pertinent and controlling words in the language of Section 205(e) are "selling", "buyer", "seller" and "overcharge". That is to say, that the right of action accrues either to the buyer or the Administrator only if a person sells a commodity above the ceiling price. The buyer or the Administrator as the case may be, then and only then "within one year from the occurrence of the violation" could bring his action against the seller "on account of the overcharge." Delivery or shipment for the purposes of this Section are dates entirely foreign to the cause which gives rise to the action. The gravamen of the offense is not the unlawful delivery but the unlawful sale. The respondent realized and recognized this fact because he charged in the Fifth Paragraph of his amended complaint as follows: (R. 9)

"The defendant demanded and received for each such sale of iron and steel products a price in excess of the maximum price to be charged by said defendant pursuant to the provisions of said Revised Price Schedule No. 49 * * *"

By the language of this allegation, it is respectfully submitted the petitioners were called upon to refute only the charge of an unlawful sale. True, that the date of the delivery may be coincidental with the date of shipment and the date of the unlawful enrichment or sale, but it does not follow, as a matter of course, for the date of the delivery or shipment may very well be a date prior or subsequent to the date of the sale and the unlawful overcharge.

It is respectfully pointed out that neither Exhibit "A" attached to the amended complaint nor any affidavit, deposition or admission on file, afforded the learned Court below one iota of evidence as to the date or the dates upon which delivery of the commodities herein allegedly unlawfully sold occurred. Indeed, Exhibit "A" very carefully avoids the giving of the dates of delivery. It is limited to the date of the invoice, the name of the alleged purchaser, the invoice number, the shipping date, the purchase order number, the net cost to the purchaser, the allowable cost to the purchaser, the alleged amount of the unlawful overcharge and an incomplete list of dates upon which the alleged unlawful sales were consummated. Accordingly, it is respectfully submitted that the learned Court below was without evidentiary basis for its finding that the commodity had been delivered within the one year period and the action therefore timely commenced. It could not rightfully presume that the shipment dates were in truth and in fact the dates of delivery.

Further, the opinion of the Court below fails to give cognizance to the legislative change which the Congress effected in the language of Section 205(e) with respect to the limitations provisions therein contained. As originally written, Section 205(e) of the Emergency Price Control Act of 1942 provided as follows:

"Any suit or action under this subsection may be brought in any court of competent jurisdiction and

shall be instituted *within one year after delivery is completed* * * *."

Prior to the time in which the respondent filed his amended complaint, the Congress amended this Section to read as follows:

> "If any person selling a commodity violates a regulation * * * prescribing a maximum price * * * the person who buys such commodity for use and consumption other than the the course of trade or business may, *within one year from the date of the occurrence of the violation* * * * bring an action against the seller on account of the overcharge * * *".

In the event that the buyer does not bring his action, then and in that event, "the Administrator may institute such action on behalf of the United States *within such one year period.*" Thus it is apparent that by reason of the legislative change, the date when delivery is completed is no longer controlling. The date of shipment was never of any importance or consequence for the purposes of this Section. Some legal efficacy must be ascribed to the legislative change, otherwise the action of the Congress would be of no moment. The only date which could possibly lend itself to the situation in an action for damages is the date upon which the sale, as that term is defined by the Act, is consummated. An examination of Exhibit "A" attached to and made a part of the amended complaint and Petitioner's Exhibit "3" clearly demonstrates that if any sales were in truth and in fact made, they were completed and the petitioners unjustly enriched on dates more than one year prior to the commencement of the action. Therefore the defense interposed by the petitioners raised genuine and material questions of fact and law which precludes the operation of Rule 56 of the Federal Rules of Civil Procedure.

The Court below in its opinion correctly concludes that Revised Price Schedule No. 49 "forbids among others, the sale, delivery or transfer of iron or steel in excess of the maximum prices". The Regulation does not concern itself with the *shipment* of iron or steel products in excess of the lawful ceilings. Its prohibition is against the sale, the delivery and the transfer of the commodity above the prices

fixed. It is significant to note that the language contained therein was promulgated long before the legislative change in Section 205(e) of the Act. It is elementary that a Regulation issued pursuant to the authority contained in the basic law cannot by the use of broader language enlarge the sphere of operation of the fundamental enactment.

Petitioners' Exhibit "3" attached to the Answer points out the sale of many items that occurred outside the Statute of Limitations. Because the shipping date was a different date than that of the sale, the Court without authority assumed the sales to have been made on the shipping date and misinterpreted the application of the Regulation defining sales. It is submitted that the Court is duty bound to make inquiry concerning the sale date and is duty bound to consider the matters set forth in Petitioners' Exhibit "3".

C. THE AFFIDAVITS ATTACHED TO THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WERE NOT ENTITLED TO ANY PROBATIVE VALUE SO AS TO FORM THE EVIDENTIARY BASIS OF THE JUDGMENT RENDERED AGAINST THE PETITIONERS.

The clear and unequivocal language of Rule 56 (e) of the Federal Rules of Civil Procedure require that supporting affidavits show upon their face that the facts therein recited would be admissible in evidence, that they are made on the personal knowledge of the affiant and that he is competent to testify to the matters stated therein. Documentary evidence referred to by the affiant must be attached to the motion and served therewith.

The Circuit Court of Appeals for the Eighth Circuit in *Walling v. Fairmont Creamery*[7] put the rule in the following language:

> "When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence and must not only be made on the personal knowledge of the affiant but must show that the affiant possesses the knowledge asserted * * *. When

[7]Walling v. Fairmont Creamery Co., 139 F. 2d 318.

> written documents are relied on they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretations of them, or mere conclusions of law or restatements of allegations of the pleadings are not sufficient."

This Honorable Court in *Sartor v. Arkansas Natural Gas Corporation*[8] puts a further limitation on such depositions. It there held that affidavits composed mainly of opinion do not comply with Rule 56(e). The Court said,

> "If they have any probative effect, it is that of expression of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally whether addressed to a jury or to a judge or to a statutory board. (Citing cases). The rule has been stated that if the court admits the testimony, then it is for the jury to decide whether any, and if any, what weight is to be given to the testimony (citing cases) * * *. The jury even if such testimony be uncontradicted may exercise their independent judgment. The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." (Citing cases).

With the requirements of the rule and the decided cases in mind, we pass now to the task of analyzing the affidavits which the Court below relied upon as the evidentiary basis for its judgment.

After reciting his past and present employment and experiences, calculated to qualify him as an expert in iron and steel products, Mr. Cyrus J. Kephart describes his labors not only over the books, records and accounts of the petitioners, but also "the records, insofar as appropriate kept and maintained by the carriers which transport the

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[8]Sartor v. Arkansas Natural Gas Corp., 64 S. Ct. 724; 88 L. ed. 967; 321 U. S. 620.

material sold by the defendant and which is the subject matter of this suit." Thus we discover that the source of information comes from two separate and distinct sets of records. From these two separate sources Kephart "collated and assembled all of the data * * * and from the same prepared Exhibit "A" which is attached to and made a part of plaintiff's complaint". (R. 49). From his labors he concludes that, "a true and correct computation of said items of overcharge as set forth in Exhibit "A" admits of no other conclusion or result". (R. 50). An examination of this affidavit up to this point will disclose that it is without value in determining the problem presented by the motion for summary judgment when viewed in the light of Rule 56 and the decided cases, for the reason that the facts and figures which the affiant collected admittedly reflect his interpretation of the records he examined and the regulations applicable thereto. The records, books and accounts kept and maintained by the carriers which Kephart is alleged to have examined were never exhibited or made available to the petitioners as is required by the Rule of Civil Procedure. Accordingly the petitioners could not challenge the correctness and the accuracy of these computations. It is also significant to note that neither Exhibit "A" nor any allegation in the amended complaint describes either generally or with particularity the steel products which the petitioner is alleged to have sold for an unlawful price. The pertinent regulation fixes and determines by complicated computations, depending upon alloys and treatment, the selling price at which the different grades of steel can lawfully be sold. Into this computation must be figured the freight rate if any. Nowhere in the record does it appear that the petitioner was favored with this information. Accordingly the accuracy or the authenticity of the schedules made and contained in Exhibit "A" could not be specifically denied or disputed by the answer and resort of necessity had to be made to the general denial allowed and permitted by Rule 8(b) of the Federal Rules of Civil Procedure.

Proceeding further with this supporting affidavit we find the affiant saying,

> "In my opinion the fact of the existence of the overcharges on the transactions involved in this suit is

> not capable of being the subject matter of an honest dispute nor can any genuine issue respecting the same, in my opinion, be bona fidely raised under the facts or on any competent interpretation of said regulation." (R. 50).

The worth of that declaration vanishes instanter for the obvious reason that it is not made on the personal knowledge of the affiant but is merely an expression of an opinion of one neither qualified by training or experience to express one. It invades the province of the court for it reflects merely a conclusion of law. It would not be admissible in evidence since the declarant does not possess professionally the knowledge which he asserts.

The closing paragraph of the affidavit is in the following vein:

> "It is my opinion that the denials contained in the defendant's answer have not been interposed in good faith and are sham and are interposed for the sole purpose of delay and that the defendant has no good, valid or substantial defense on the merits to the plaintiff's cause of action." (R. 50).

This reckless declaration reflects a desperate and labored attempt on the part of one who so far as this record discloses, is neither qualified by training or experience to venture the simplest of legal opinions. It brazenly invades the sacred province of the Court and is obviously the distorted expression of one who has an interest in the outcome of the litigation.

The second affidavit relied upon is from Richard E. Myers, a price clerk attached to the Office of Price Administration. Under the present state of the record there is nothing to qualify him as an expert of any kind. His contribution in support of the motion is offered in the following language:

> "I have read the affidavit of Cyrus J. Kephart and the facts therein set forth are true and correct according to my best knowledge, information and belief." (R. 50).

The affidavits are to the effect that the affiants examined

records of the petitioners relating to the sale of iron and steel products together with other records. That from an examination of the invoices, customers' purchase orders, freight bills, correspondence and other records and accounts relative to this litigation, they arrived at the following conclusions:

(1) That the products had been sold.

(2) That there had been an overcharge.

(3) That the denials in the answer were interposed in bad faith and were sham, and that petitioner had no good and valid defense.

Thus it would appear that the Court disregarded the general denials and the Fourth and Eighth Defenses and accepted the opinion of the affiants that a sale had been consummated and an overcharge had been made without considering the matters raised in the answer, thus denying to the petitioners the right to be heard. The Court has repeatedly held that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is doubt and a bona fide dispute exists between them."

## CONCLUSION.

It is respectfully submitted that for the reasons hereinabove argued the petition for writ of certiorari should be granted.

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[9]Associated Press v. United States, Vol. 89 L. ed. 1512 Adv. Op.